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Jan Cremers

Towards a European Labour Authority

Mandate, Main Tasks and Open Questions

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AT A GLANCE

- This study explores problems in the area of cross-border labour mobility and suggests that fair working conditions in the Single Market could be enhanced by the establishment of a European Labour Authority.
- The main problem is that the competence of national authorities to control and enforce national labour standards ends at the border. Thus, new forms of regulatory arbitrage, regime shopping and the evasion of existing labour standards cannot be effectively monitored and sanctioned.
- The author suggests that a European Labour Authority should legitimise and facilitate cross-border cooperation between national competent authorities. The main task should be to solve disputes in case of infringements and breaches related to labour mobility and/or cross-border recruitment.

INTRODUCTION

The European Union's Single Market project seeks to ensure the free movement of goods, services, capital and citizens. The principle of free movement of workers is enshrined in Article 45 of the Treaty on the Functioning of the European Union (TFEU). Mobile EU28 citizens move mainly for employment-related reasons, and labour mobility within the framework of cross-border provision of services has increased over time.¹ However, most of the instruments that can be used to verify the lawfulness of mobility practices face limited national competences. This makes it difficult to effectively tackle abuses of current regulations, cases of fraud and failure to respect workers' rights, in particular in cross-border posting situations. Against this background, European Commission president Juncker, in his State of the Union Address at the European Parliament in 2017, announced plans for a European Labour Authority, tasked with ensuring that EU rules on labour mobility are enforced fairly, simply and effectively.

Juncker grounded the establishment of such an authority on the growing mobility of workers in the EU, large-scale transnational commuting and the substantial increase in the free movement of citizens for reasons of business, family or tourism. He promised to come up with a proposal to establish such a European Labour Authority by March 2018. The creation of the European Labour Authority should strengthen cooperation between labour market authorities at all levels and lead to the better management of cross-border situations, as well as to further initiatives in support of fair mobility, such as a European Social Security.

This brief study discusses some of the challenges that competent authorities active in the area of compliance control and enforcement are currently facing in European labour markets. Section 1 sets the scene and describes the current problems concerning the control and enforcement

of labour mobility. The section draws on insights from different research projects that have explored the difficulties faced by labour inspectorates and other compliance services. Section 2 provides a brief overview of possible sources for delineating the mandate of a European Labour Authority. A broad range of national practices exist in the area of control and enforcement of labour law legislation. The mandate of a European Labour Authority should be compatible with the variety of labour inspection systems already existing in the member states, in order to guarantee proper application of the prevailing regulatory, legislative and conventional framework of labour legislation and working conditions.² ILO Convention No. 81 on labour inspectorates, which all EU member states have ratified, is therefore a good starting point. Section 2 also outlines institutions that have already been established at the EU level to enhance cooperation between national authorities in the field of labour law enforcement and shows that these institutions lack teeth. The final section provides a series of reflections on the main tasks, competences and structure of the planned authority.

¹ In 2015, almost 11.3 million EU28 citizens and 168,000 EFTA citizens of working age were residing in a member state other than their country of citizenship, totalling some 11,434,000 people. This was an increase of 5.3 per cent compared with 2014. The total number of workers temporarily active abroad in 2015, measured on the basis of the overall number of A1-forms issued to persons insured in a member state other than the member state of (temporary) employment, increased by roughly 7 per cent, reaching a total of 2.05 million (European Commission 2016 and 2017).

² In this context »conventional« refers to the agreements (and other outcomes) concluded by management and labour in collective bargaining and other autonomous negotiation processes. These bargaining results are seen by the author as the conventional part of the regulatory framework for the protection of all workers who pursue activities in a given territory.

1

CONTROL AND ENFORCEMENT OF LABOUR MOBILITY IN THE SINGLE MARKET

The European Commission proposes that a European Labour Authority should have three main tasks:

- (i) increased cooperation between national administrations;
- (ii) combining existing instruments of cross-border labour mobility; and
- (iii) organising joint transnational control activities to fight breaches of labour and social legislation.

Concerning practical experiences in these fields so far, there are a variety of problems encountered in control and enforcement activities at national level, as soon as a transnational dimension comes into play. More specifically, loopholes in control and enforcement procedures are a major problem. Given the exploratory character of this paper, the description will be brief and reference will be made to other sources for more details.

1.1 FIRST PROBLEM: REGIME SHOPPING, REGULATORY ARBITRAGE AND CROSS-BORDER RECRUITMENT AS A LABOUR COST-SAVING METHOD

If the aim of the European Labour Authority is to help strengthen cooperation between labour market authorities at all levels and to improve management of cross-border mobility, the relevant »playing field« can be found in the regulatory framework for working and living conditions that applies in situations of cross-border mobility. On one hand, competences to decide on and control compliance with the regulatory framework of pay and working conditions stem from and are related to principles and rights enshrined in EU and national legislation (in the labour, social security and fiscal domains). On the other hand, these competences are related to provisions in agreements resulting from collective bargaining. This has been extensively analysed and discussed in research and assessments (Cremers 2016).

There is evidence that the demand for cheap labour has contributed to new forms of regulatory arbitrage in Europe, characterised by regime-shopping and the evasion

of existing legal and conventional frameworks to the detriment of working conditions. Partly this is the result of the creation of a Single Market, with primacy given to economic freedoms binding across the EU, while the control (and enforcement) of labour legislation and working conditions has a mandate that usually ends at national borders. The general experience is that, as soon as a transnational dimension is introduced into labour market relations, compliance control is hampered. In recent decades, this has been manifest in several industries, first and foremost labour-intensive industries such as construction, manufacturing, shipbuilding, transport and logistics, but more recently also in all kinds of services. The use of a foreign (artificial) entity in a cross-border context can lead to the introduction of questionable forms of labour recruitment, with blurred labour relations, the circumvention of social security payments and tax evasion. Freedom of establishment and the free provision of services in this context provide a breeding ground for artificial arrangements (such as »letterbox« companies), as these freedoms provide an unrestricted entrance to the EU member states' labour markets (ETUC 2016).

In practice, this becomes manifest in:

- the use of cheaper conventional frameworks (non-binding agreements or collective agreements that have a softer regime of employers' contributions);
- the circumvention of (mandatory) employer contributions to industry-wide provisions and funds (vocational training, OSH and other social policy and protection funds);
- the »flagging-out« or conversion of agency work into the provision of services (no wage related costs, only invoices); and
- the introduction of chains of cross-border subcontracting and/or foreign subsidiaries.

The problem arises as soon as this cross-border labour-only subcontracting is presented as »provision of services«. In this situation, the freedom to provide services

with posted workers creates an opening for forms of recruitment that were never intended by the legislators. This is especially the case when companies externalise the recruitment of labour to small subcontractors, leading to the use of agencies, gang masters and other intermediaries that act as go-betweens for workers and user undertakings or specialised subcontractors. Distortion of the labour market as a result is potentially substantial and, for instance, the posting of workers within the framework of the free provision of services has become a channel for the cross-border provision of cheap labour in the Single Market while evading the equal treatment that can be derived from the EU legislation on free movement of workers.

Similarly, employers make cost savings on social security by hiring workers from low-contribution countries for employment in countries with high social security contributions, in compliance with EU law. The so-called A1-form is a declaration that the worker in question is insured in the country of registration, thereby suggesting that their employment is perfectly legal. However, the use of an A1-form and resort to posting (even if it is just suggested) can hamper investigation and control of regulatory compliance. It requires verification in the country of registration, which is time-consuming, as well as the establishment of a working relationship with foreign authorities. Pay-related tax-saving methods take a number of forms, often combined with other cost saving methods. Low wages lead to lower payroll tax, while undeclared or untaxed allowances and other net payments diminish total tax costs, both income related and corporate. Fiscal engineering and lack of clarity about where turnover is realised offer additional methods to lower corporate tax. In this area the use of foreign subsidiaries is »perfectly legal« and, indeed, has become »business as usual«.

Recent research in the Netherlands on the enhanced control and enforcement of labour standards and working conditions underlines the problematic relationship between the working conditions of workers involved in temporary cross-border activities and the free provision of services (Cremers 2017). The assessment focused on the results of a campaign launched in the Netherlands after the 2013 social pact. In this pact, the social partners and the government decided to enhance their cooperation in the campaign against letterbox companies and in the control and enforcement of collective agreements and mandatory working conditions. The assessed files provided evidence that cross-border recruitment is often used as a labour cost-cutting method, with savings on direct wage costs resulting from partial or non-compliance with established standards. The breaches found were not restricted to wages and working conditions. The assessment gave clear indications of similar questionable practices in contiguous policy areas (social security, taxation).

1.2 SECOND PROBLEM: BLURRED COMPETENCES

Conflicting rules, spread over different policy areas, legal complexity and the fragmentation of mandates hamper effective compliance and enforcement activities and

therefore favour the emergence of unreliable actors. This situation undermines legal certainty, effective monitoring and rule enforcement, to the detriment of bona-fide cross-border mobile workers and genuine service providers.³

Concerted action by the compliance and enforcement authorities is a key factor in the fight against fraudulent practises involving cross-border labour. Effective and comprehensive inspection initiatives must be ensured. The social partners (and related industry-wide institutions) can be seen as essential stakeholders in this overall policy approach. This applies even more to the pursuit of permanent change in the perception of fraud in terms of costs and benefits by both citizens and businesses. Competences to control and decide on compliance in the cross-border recruitment of labour with the regulatory framework for pay and working conditions, as enshrined in collective agreements and labour legislation, should be allocated more to the territory where the work is performed. Clarity of competences is relevant in order to enable authorities to work effectively; this requires a reassessment and upgrading of the »*lex loci laboris*« principle.⁴

A series of projects led by the French *Institut National du Travail, de l'Emploi et de la Formation Professionnelle* (INTEFP) aimed to improve transnational administrative cooperation between the relevant public authorities and collaboration with the social partners. The INTEFP projects, based on exchanges between the inspectorate, the social partner organisations, liaison offices and other relevant national actors, underlined the necessity of enhanced cooperation between all stakeholders (public and competent bodies, social partners). This enhanced cooperation is relevant before cross-border activities start and in the period of performance in the host country (and, in case of breaches, even after the activity has ended). Related to the posting of workers, within the framework of free service provision, the project showed that control of the regularity (or lawfulness) of posting and the collection of evidence and supporting documents were hindered by fragmented competences and a lack of mandate in the host country. Deficient competences became manifest as soon as an attempt was made to frame activities, rightly or wrongly, in terms of cross-border mobility under freedom of establishment (in another constituency), freedom of contract and freedom to provide services.⁵

One key joint frustration for competent institutions, and in fact for all stakeholders in these investigations, is the difficulty of bringing breaches of the law to justice. Research in the Netherlands, cited beyond (Cremers 2017), on the enhanced control and enforcement of labour standards and working conditions points to the crucial significance

³ A good overview of the dispersed competences can be found in a handbook produced by the Senior Labour Inspectors' Committee (2016).

⁴ The *lex loci laboris* principle encompasses the notion that economically active persons are subject to the labour legislation and working conditions of the country in which they are carrying out their work, even if they are residents of another country.

⁵ INTEFP's mission is enshrined in French law (decree 2005-1555, December 2005). Besides its main task – the training of the labour inspectorate – INTEFP is tasked with initiating national and international partnerships that are relevant for the work of the inspectorate.

of competences and the operational mandate of the actors and institutions involved. Participants in the INTEFP project often concluded, once irregularities were detected, that an accumulation of breaches and circumvention was the rule rather than the exception. Enforcement and compliance offices had to deal with competence problems and related legal and operational difficulties in seeking to trace circumvention in cross-border situations, besides the weakness of the existing sanction mechanisms. This raises the question of where competence lies for the overall compliance control of the rules concerning cross-border provision of services using posted workers.⁶

No allocation of transnational competences in the social field is regulated at EU level. The European legislator has monitored free service provision from the perspective of whether national conditions could become a »barrier« to business. On the other hand, a workforce confronted by non-genuine service providers that circumvent national conditions is not seen as an EU responsibility. The EU (and the member states) always refer in such cases to national competences. However, in the research of the practical cases cited here it appears that the activities of most competent national authorities in the social field end at the border, as the mandate of control and enforcement institutions is limited to the national territory. The competence to check the reliability of documents that underpin the cross-border activity and, if necessary, to withdraw these documents, is missing. As most cases stem from situations based on EU internal market rules – such as freedom of establishment and the free provision of services – a EU-legitimised mandate conferred on competent authorities across the EU, irrespective of being located in the sending or the receiving country would seem much more appropriate. In order to establish such an EU competence, more horizontal transnational cooperation across all relevant policy areas is of the utmost importance and this has to be combined with a broadening of the mandate to act transnationally.

1.3 THIRD PROBLEM: LACK OF A EUROPEAN COMPLAINTS MECHANISM

There is scarcely any complaint or redress mechanism in the social field concerning the internal market rules that regulate the economic freedoms. There is nothing comparable to, for instance, the procedures in the competition field where the Commission has to initiate proceedings for detecting infringements of competition rules, as well as the handling of complaints and the hearing of the parties concerned.⁷

Problematic for all stakeholders in a compliance campaign with cross-border elements is the lack of effective sanctions. Fines are weak in an extra-territorial context and most countries have no specific punitive enforcement instruments that are effective in cases involving transnational

An example of a business model

The social partners and the inspectorate have in several studies (Lanove 2013, INTEFP 2013, ETUC 2016) reported the appearance of artificial legal entities, established for the purpose of subcontracting work to one or more countries. The phenomenon has become associated with a cheap labour business model: letterbox companies that operate in a cross-border context and select the social security and labour standards regime that is the least regulated and most profitable. Ownership and employer liabilities are obscured or blurred by using proxy owners or strawmen. The workers often work under the direct supervision of the user undertaking, thus creating a situation of bogus subcontracting or illicit provision of labour.

The possibility of tackling dubious subcontracting practices that obstruct enforcement and redress is extremely weak. These entities take advantage of limited inspection competences and a lack of transnational enforcement mechanisms to deprive workers of their wages and contributions. In practice, cross-border recruitment through fictitious ownership prevents states from reinforcing employment and labour standards. Such artificial arrangements pop up and disappear as soon as investigations start. In this way, people liable for bogus activities can bypass proper control and enforcement.

actors. The fact that the tackling of fraudulent cross-border labour recruitment very often comes too late or that these practices can pop up repeatedly, leads to serious frustrations among the institutions concerned. The legal instruments of the national compliance offices do not include sanctions such as the withdrawal or deregistration of establishments. Moreover, in the EU social fraud is still not considered a major offense that can justify Europe-wide sanctions.

Compliance offices often detect firms that are active in several countries, using the same methods, while their presence in the country of registration is only symbolic.⁸ This calls for cooperation in control and compliance activities, but also in the enactment and implementation of sanctions. Effective measures are needed in order to promote genuine operations and prevent abuses. Fake entities should be refused entrance to the market (for example, by withdrawing licenses and certificates or exclusion from public procurement bids). Sanctions need to have an EU-wide effect in order to prevent bogus actors from starting all over again in other jurisdictions.

One key element missing at EU level is the possibility for the social partners, who are ultimately the bearers and initiators of collectively agreed wages and working conditions,

⁶ See: http://www.eurodetachment-travail.eu/datas/files/EUR/synthese-generale_2013EN.pdf and http://www.eurodetachment-travail.eu/datas/files/EUR/EURODETACHEMENT_project_2014_EN_.pdf.

⁷ See, for instance, Council Regulation (EC) No 773/2004.

⁸ There is a website that provides a long list of firms notorious for these practices: <http://www.stoppafusket.se/>. See also: www.rte.ie/news/play-er/2014/1106/20677365-the-treatment-of-foreign-workers-by-irish-firms/.

to intervene and to be heard in disputes with a cross-border character. Most member states have set up a range of parity-based, sectoral or interprofessional committees with a mandate to step in as soon as there is an industrial dispute or differences in interpreting agreements and other concluded provisions. These joint bodies are usually composed of representatives of management and labour, and have the task of preventing, resolving and settling disputes and conflicts. Social partners have established compliance institutions and counselling offices and cooperate in targeted campaigns. Just like the compliance authorities established by the national legislator, the mandate of these bodies ends at the national border. There are no institutionalised procedures that can deal with industrial disputes of a cross-border nature. Given also that this does not belong among the tasks of the Court of Justice of the European Union, there is no arbitration or labour dispute resolving institution at transnational level that can intervene effectively.

2

USEFUL GLOBAL AND EU SOURCES FOR THE MANDATE OF A EUROPEAN LABOUR AUTHORITY

Across the European Union, there is a broad range of national practices in the area of control and enforcement of labour market regulation. Therefore, it is not easy to describe a common denominator of these institutions. The responsible and competent national organisations in the member states encompass different types of labour inspectorate and other compliance and enforcement institutions (varying from liaison offices with relatively little authority or institutions with limited task prescriptions – for instance, restricted to OHS matters – to bodies with very broadly defined operational tasks). Several member states have established arbitration offices, labour courts or other specialised entities that can intervene in industrial disputes and conflicts. It would certainly be worthwhile to study these national practices in more detail. However, for reasons of space the study focuses on transnational sources that can provide a benchmark.

Interesting reference can be made to the ILO, especially in the area of the monitoring of labour legislation and collective agreements. All EU member states have ratified the ILO Labour Inspection Convention, 1947 (No. 81).⁹ Convention No. 81 requires ratifying states to maintain a system of labour inspection for workplaces in industry and commerce and sets out a series of principles concerning the fields of legislation to be covered by labour inspection. The convention also defines the functions and organisations of the system of inspection, and the powers and obligations of the inspectorate. Basic elements of the work of the inspectorate can be found in this Convention. Labour inspectors examine the application of legal provisions related to conditions of work and the protection of workers while engaged in their work. The defined primary duty of the inspectorate is to secure the enforcement of legal (and conventional) provisions,

to provide advice to employers and workers on such matters as working time, wages, occupational safety and health, and child labour, and to notify the authorities concerning defects and/or abuses. Labour inspectors serve as an antenna for national authorities with regard to loopholes and defects in the national regulatory framework.¹⁰

Also relevant in this context is the fact that the Convention talks about appropriate arrangements that have to be made to promote effective cooperation between the inspection services and other government services and public or private institutions engaged in similar activities, and collaboration between officials of the labour inspectorate and employers and workers or their organisations. The inspectorate shall be empowered to freely enter, without prior notice, any workplace liable to inspection and to carry out any examination considered to be necessary. The inspectorate shall be empowered to take steps with a view to remedying observed defects, varying from orders requiring alterations to immediate executive force in the event of serious danger. Violations can be tackled by warnings, the prescription of remedial or preventive measures or legal proceedings, with adequate and effective penalties provided for by national laws or regulations. In the Convention, the term »legal provisions« includes, in addition to laws and regulations, arbitration awards and collective agreements on which the force of law is conferred and which are enforceable by labour inspectors. The wording of Convention No. 81 is clear about territory; it addresses national authorities. Neither transnational nor supranational proceedings are envisaged. However, with ratification by all member states, the intentions of the Convention could be a good starting point.

⁹ Labour Inspection Convention, 1947 (No. 81), Convention concerning Labour Inspection in Industry and Commerce. The flanking Protocol of 1995 that extends the application of Convention No. 81 to non-commercial workplaces, has been ratified by only six EU member states. Labour Inspection (Agriculture) Convention, 1969 (No. 129) that, similar in content to Convention No. 81, requires ratifying states to establish and maintain a system of labour inspection in agriculture has been ratified by 21 member states.

¹⁰ One of the basic principles of the European social model is respect for the regulatory labour market framework that exists in the member states. This regulatory framework for the protection of workers can consist of the national labour legislation and other labour market-related legal acts. However, in most countries, the framework is a mixture of labour legislation and (the outcomes of) collective bargaining. As the composition of the mix is different in every country, European policies impacting labour market and social policies have to recognise and deal with that diversity. Collective bargaining as such is a constitutional right in the European Union's body of law (enshrined in the *acquis communautaire*).

Table 1
ILO Convention No. 81

Main institution	Labour inspectorate
Scope	<ul style="list-style-type: none"> – Legal provisions – Collective agreements
Stakeholders	<ul style="list-style-type: none"> – Social partners – Other government services – Public and private institutions engaged in similar activities
Competences	<ul style="list-style-type: none"> – Limited to national territory – All investigation considered necessary – Right to enter sites – Initiatives to remedy – Executory power
Tasks	<ul style="list-style-type: none"> – Examine workplace-related cases – Enforce rights – Remedy of observed defects – Advise employers and employees – Inform and notify legislator
Sanctions	<ul style="list-style-type: none"> – Warnings – Prescription of remedies – Financial penalties – Legal proceedings

The European Parliament has, on several occasions, formulated its thoughts about more effective inspections. In January 2014 the European Parliament adopted a resolution on effective labour inspections to improve working conditions in Europe (European Parliament 2014) with proposals for a new strategy, including a recommendation to introduce a European agency dealing with all kinds of cross-border matters within the field of labour inspection. Although the explanatory statement of the EP report focuses strongly on the phenomenon of undeclared labour, the recommendations are formulated against the more general background of problems faced by labour inspectorates in the EU. The rapporteur not only lays down principles for effective labour inspections in the member states, but also highlights policy recommendations to promote cross-border cooperation between national authorities, combined with legal initiatives to strengthen the role of labour inspections. In summary, the European Parliament stresses the role of cooperation between an independent inspectorate and the social partners; the report also points to the responsibility of the inspectorate for all workers within its territory and asks for the development of inspection methods in line with Convention No. 81, with effective and dissuasive sanctions.

Several recommendations are directly linked to the transnational or cross-border dimension. The European Parliament suggested the establishment of a European platform for labour inspectors on undeclared work in order to facilitate the exchange of experiences and good practices; to provide up-to-date, objective, reliable and comparative information; to enhance cross-border cooperation; and to identify and keep a record of letterbox companies and similar operations. It calls on the Commission to devote adequate human resources for cross-border matters concerning

the abuse of employment protection rules and undeclared work – with a remit including, inter alia, the identification of letterbox companies and the control of transnational service providers – and to develop EU-wide further-training programmes for inspectorates that address challenges such as bogus self-employment and posting, the identification of new ways of circumventing the rules and the organisation of cross-border controls and inspections. The European Parliament is aware of the limited competences of inspectorates in cross-border situations and calls on the Commission and the member states to ensure that labour inspections can make full use of their right to non-discriminatory independent inspections in cross-border situations, regardless of a company's place of establishment.

In this overview reference has to be made to three institutions at European level: the Senior Labour Inspectors' Committee (SLIC), the Administrative Commission (on the Coordination of Social Security Systems) and the European Platform Tackling Undeclared Work. The principal role of all three is to promote enhanced cooperation between national competent authorities. The initiatives have restricted competences, limited to the exchange of information and the signalling of defects and frictions.¹¹

¹¹ Reference can be made to the tradition of cross-border cooperation in other areas based on EU legislation, such as food and consumer rights. EU consumer policy has a longer tradition, with sanctions that have to be effective, dissuasive and proportionate. Cooperation between member states has, for instance, to ensure that they require the cessation of illegal practices by operators in their territory who target consumers in another member state. The Commission coordinates common actions to address EU-wide problematic practices and promotes cooperation between national competent authorities to ensure that consumer rights legislation is applied and enforced consistently across the Single Market. Moreover, the national consumer authorities have the possibility, if there is a cross-border aspect to a breach, to address it through the *Consumer Protection Cooperation* network at the European level.

Excursion to the land of »free enterprise«

One transnational territorial situation that is particularly worth mentioning is the approach to inspection in the United States. There is a wide variety of voluntary, cooperative provisions and compliance and enforcement practices in the different US states. In 1998, for instance, the United States adopted the Strategic Partnership Program for Worker Safety and Health. With this programme, the *Occupational Safety and Health Administration* entered into an extended, voluntary relationship with groups of employers, employees and employee representatives in order to encourage, assist and recognise their efforts to eliminate serious hazards and achieve a high level of safety and health in the workplace.

In another policy area, the *Davis-Bacon Act*, amended in 2002, lays down that prevailing wages have to be respected in a state in which work is performed. The Act formulates clear sanctions across the whole of the US in case of non-compliance, for example, the distribution of a list of persons found to have disregarded their obligations to employees and subcontractors and their exclusion from public contracts for three years.

The *Wages Act* and the *Fair Labor Standards Act* establishes minimum wage, overtime pay, recordkeeping and youth employment standards affecting employees in the private sector and in Federal, State and local governments.

The *Fair Labor Standards Act* provides the legal framework for the *Wage and Hour Division* (WHD), an office created in the *Department of Labor*, led by the *Administrator* who is appointed by the President, by and

with the advice and consent of the Senate. The WHD is responsible for administering and enforcing some of the most important worker protection laws. Workers can file a complaint at one of the 200 WHD offices.

The principal office of the *Administrator* is in the District of Columbia, but they or their duly authorised representative may exercise any or all of their powers in any place at federal level. The *Administrator* or designated representatives may investigate and gather data regarding wages, hours and other conditions and practices of employment, and may enter and inspect such places and such records (and make transcriptions thereof), question such employees, and investigate such facts, conditions, practices or matters as they may deem necessary or appropriate to determine whether any person has violated any provision, or which may aid in the enforcement of the provisions.

With some exceptions, the *Administrator* utilises the bureaus and divisions of the *Department of Labor* for all necessary investigations and inspections. With the consent and cooperation of State agencies charged with the administration of State labour laws, the *Administrator* and the *Secretary of Labor* may, for the purpose of carrying out their respective functions and duties, utilise the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes. This means that the *Administrator* can act beyond the level of the individual US state.

- (i) The *Senior Labour Inspectors' Committee* (SLIC) started to meet informally in 1982 to assist the European Commission in monitoring the enforcement of EU legislation at the national level. A Commission Decision (95/319/EC) gave the Committee formal status in 1995 with a mandate to give its opinion to the Commission, either at the Commission's request or on its own initiative, on all problems related to the enforcement by the member states of Community law on health and safety at work. In principle, this means that SLIC has the task of formulating common principles of labour inspection, restricted to the field of health and safety at work. Over time, some SLIC activities have been extended to, for instance, the broader analysis of working conditions for posted workers. SLIC has neither operational tasks nor executive power.
- (ii) The *Administrative Commission (on the Coordination of Social Security Systems)* deals with interpretative and administrative controversies arising from the social security coordination regulations. The commission facilitates a uniform application of the EU legislation, in particular by promoting exchange of experience and

best practices. It fosters and develops cooperation between member states in social security matters and helps parties to reach agreements on questions of principle that arise between the member states. The commission is composed of a government representative of each member state, assisted, where necessary, by experts. The commission discusses the need for amendments to the coordination regulations and formulates proposals to the European Commission with a view to improving and modernising the legislation. Its interpretative decisions and recommendations are published in the Official Journal of the EU. Although the decisions are formally not legally binding, member states are bound by decisions they have adopted and must follow them, based on the principle of good cooperation.

- (iii) The *European Platform Tackling Undeclared Work*, established by Decision (EU) 2016/3441, brings together relevant authorities and actors involved in fighting undeclared work. The Platform provides different actors, including social partners and enforcement authorities, such as labour inspectorates, tax and social security authorities, with activities that promote the

exchange of information and good practices, the development of knowledge and evidence and engagement in closer cross-border cooperation, through staff exchanges and joint projects. Its objectives are to contribute to more effective EU and national actions aimed at improving working conditions, promoting integration in the labour market and social inclusion, including better enforcement of law within those fields, reducing undeclared work and promoting the emergence of formal jobs. The Platform – which is still in its initial stages – seeks to encourage and facilitate innovative approaches to effective and efficient cross-border cooperation, to evaluate experiences and to contribute to a horizontal understanding of relevant matters.

A common denominator of the three institutions is the lack of executive and operational powers. The Administrative Committee has some legislative competences with regard to its explanatory decisions and recommendations related to possible problems of interpretation with regard to the Regulations for coordinating social security. Overall, however, there is little possibility for intervening in transnational issues.

The main activities of the three bodies are the exchange of information, the dissemination of good practices and the promotion of cooperation in selected areas. The focus is on one issue or aspect, although we have seen that the problematic aspects of labour mobility call for coordinated action across all relevant policy areas.

3

TASKS, COMPETENCES AND STRUCTURE OF A EUROPEAN LABOUR AUTHORITY

The need for an authority that deals with labour mobility is almost self-evident, given the practical experiences and problems listed in the short summary in Section 1. Free movement will survive only if it is grounded on the principle of equal treatment in the territory where work is carried out. However, at present, national authorities are unable to meet their obligations as soon as transnational elements enter the picture. Cooperation is just one aspect of an effective remedy. It may also be mentioned that the existing institutions at European level – on one hand, the SLIC or the Undeclared Work platform and on the other agencies such as Eurofound and the Bilbao Agency – have no opportunities to take real action.

3.1 MAIN TASKS

Problems related to labour mobility can be tackled effectively only by an authorised institution with a mandate to exercise any or all of its powers across the EU. This is the most fundamental benefit that such an authority can provide. However, the functioning of the European Labour Authority will be effective and successful only if it is not overloaded. In its initial stage, the authority's core task should be restricted to infringements related to labour mobility and/or cross-border recruitment, which find their origins in the functioning and application of the EU's economic freedoms. The European Labour Authority should play a key role in the structural prevention and solving of problems and breaches originating from the relevant labour mobility *acquis*. An accumulation of different tasks and functions, however well motivated and valid, would frustrate the process and bear the risk that no task would be performed properly.

Tackling labour mobility problems and disputes has to be made operational through:

- the establishment of arbitration procedures that can solve labour mobility frictions and related claims outside the courtroom;
- combining existing national instruments across all relevant and intertwined policy areas (social legislation,

binding collective agreements, social security and tax obligations), leading to complementary functioning in relation to existing national compliance bodies;

- the assessment of conflicting national and EU rules and interpretation problems, combined with an in-depth analysis of the mechanisms underlying circumvention practices and similar breaches;
- working towards recommendations to the European legislator in relevant domains of the Single Market and the Community *acquis* (freedom of establishment, free service provision, free choice of contract, company law);
- a clear division of labour with regard to the existing bodies (the Agencies, the Administrative Commission and the Platform on Undeclared Labour) and the European Labour Authority; and
- access for the main stakeholders to infringement procedures at the Court of Justice of the European Union.

The relationship with the Court of Justice of the European Union is of particular importance when it comes to setting these tasks. The first priority is to settle disputes by means of dialogue between the national stakeholders (competent organisations and institutions of the member states, social partners and other bodies with a legitimate interest in the cessation or prohibition of intra-Community infringements). If they cannot reach agreement, it is open to them to refer the matter to the European Labour Authority. Without taking a stand in the debate on whether or not there should be a special unit at the Court of Justice of the European Union for labour disputes, it would be appropriate to provide the European Labour Authority with the possibility of appealing directly to the Court of Justice of the European Union for a decision, if the Authority is unable to reconcile the viewpoints or find a solution.

3.2 COMPETENCES AND MANDATE

Barriers encountered in compliance activities at national level often arise from frictions between the existing juridical framework that the Single Market provides for service providers and foreign establishments and the limited territorial mandate of the competent authorities. Existing national compliance arrangements that are supposed to protect workers' interests are not adapted to the challenges of enforcement in the internal market. Effective and efficient enforcement cooperation is often complicated. So far, the EU has tried to tackle this in the field of labour and social policy with administrative cooperation («mutual assistance», «good faith»), without a strong mandate or legally binding obligations. The cooperation is «soft», compared with policy applied in handling possible abuses in trade, consumer protection or fiscal policies.¹²

The notion that the European Labour Authority would have to lead to enhanced cooperation is not controversial. However, practical experiences with compliance activities indicate that this is no guarantee of fair labour mobility. Different opinions and interpretations between member states or involved stakeholders, fragmented competences and too strong demarcations of mandates, as well as a lack of social considerations in parts of the internal market regulations (leading to no mandate at all in relevant policy areas, such as company law) hinder the effective tackling of breaches and abuses. Therefore, the European Labour Authority should have a broad mandate to detect and investigate, with the competence to take all necessary enforcement measures to bring about the cessation or prohibition of abuses. The authority should complement, monitor and supervise the activities of national compliance offices and instances. It must have the competence to set up or legitimise joint inspections and to oblige member states to cooperate in these investigations, in cases where relevant stakeholders bring claims forward or demand assistance with compliance. This includes the competence to

initiate investigations that go beyond the strict competence limitations that exist in some member states in relevant policy areas. This includes the capacity to launch and coordinate common actions to address problematic EU-wide practices in the *Cross-border enforcement and cooperation* (CPC) of consumer protection. In the CPC domain, organisations with an interest in consumer protection have the right to indicate bad cross-border practices to enforcers and to the European Commission.

Based on these investigations, the European Labour Authority should have the power to settle disputes through arbitration and, if necessary, by adopting binding decisions. Member states should be bound by these decisions and should follow them, with the right to appeal to the Court of Justice of the European Union. The European Labour Authority must have the power to ask the Commission to start an infringement procedure (in case of violation of EU labour law). Monitoring should also lead to the formulation of possible amendments to the regulations that underpin the labour mobility in proposals to the European Commission. It thus could contribute to improving and modernising the legislation.

3.3 STRUCTURE

The establishment and structure of the European Labour Authority should do justice to the fact that the regulatory framework for fair labour mobility is built up, on the one hand, by the legislator (at national level often based on tripartite consultative or advisory structures), and on the other hand by the partners in collective bargaining. The supervision and enforcement of the legislative component of this regulatory framework belongs to the competent authorities, usually established and organised by the national legislator. The conventional component is based on collective bargaining between representatives of management and labour, without direct interference by the legislator. This is a strong argument against compulsory arbitration or conciliation and must be reflected in the design of the European Labour Authority.

The most logical structure of the European Labour Authority, therefore, would be to set up an office with two layers:

- (i) A general committee that deals with frictions, disputes and problems in the field of cross-border labour mobility that originate from lack of transparency or cooperation, and from different interpretations of **the legal part of the relevant acquis**; the composition of this body should be tripartite.
- (ii) A second committee (or chamber) dealing with frictions, disputes and problems in the field of cross-border labour mobility that origin in a lack of transparency or cooperation, and different interpretations of **the conventional part of the relevant rules and provisions**; the composition of the committee should be bipartite.

¹² Directive 2006/123/EC (the Services Directive) gives some directions, where it says: «Administrative cooperation is essential to make the internal market in services function properly. Lack of cooperation between Member States results in proliferation of rules applicable to providers or duplication of controls for cross-border activities, and can also be used by rogue traders to avoid supervision or to circumvent applicable national rules on services. It is, therefore, essential to provide for clear, legally binding obligations for Member States to cooperate effectively» (consideration 105). Article 28.4 of the Services Directive forces member states to «ensure that providers established in their territory supply their competent authorities with all the information necessary for supervising their activities in compliance with their national laws». And Article 29.3 obliges member states of establishment, upon obtaining actual knowledge of any conduct or specific acts by a provider established in its territory which provides services in other member states, that, to its knowledge, could cause serious damage to the health or safety of persons or to the environment, to inform all other member states and the Commission within the shortest possible period of time. Finally, Article 31.4 provides a very broad mandate to the relevant host country authorities to check the service provider, asserting that the competent authorities may on their own initiative, conduct checks, inspections and investigations on the spot, provided that those checks, inspections or investigations are proportionate, not discriminatory and not motivated by the fact that the provider is established in another member state.

3.4 OPEN QUESTION

In order to make this model work, consideration has to be given to the following:

- which relevant stakeholders can ask for activation of the authority?
- what happens in the event of non-compliance with binding decisions?
- should the European Labour Authority have executive power with direct punitive authority?

Finally, once more a parallel can be drawn with consumers' rights in the internal market. Regulation 2006/2004 on co-operation between national authorities responsible for the enforcement of consumer protection defines an »intra-Community infringement« as any act or omission contrary to the laws that protect consumers' interests, that harms, or is likely to harm, the collective interests of consumers residing in a member state or member states other than the member state where the act or omission originated or took place; or where the responsible seller or supplier is established; or where evidence or assets pertaining to the act or omission are to be found. National competent authorities responsible for consumer protection have the competence to require the cessation or prohibition of any intra-Community infringement and, where appropriate, to address resulting decisions to the European Commission and the other member states.

It seems logical to provide the competent authorities in the area of fair labour mobility with similar competences and facilities, under the supervision of the European Labour Authority.

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